No. 89-1255

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ON REPLY TO BRIEFS IN OPPOSITION

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I. INTRODUCTION

One of the few things upon which the parties agree is that Congress codified a full value standard of liability for loss and damage in transit. (49 U.S.C. §11707). Where they sharply disagree is as to whether an automatic release in a carrier's tariff adequately complies with the terms of the limited statutory exception to the full value rule for a "written declaration of the shipper . . . or a written agreement between the carrier and shipper" releasing the freight to a limited value.

Thus, the government asserts that the term "released value" in transportation parlance refers to a value "the carrier assumes" for a shipment. (Govt. brf. at 3.) On the contrary, it is the shipper which releases the value of its freight through the affirmative act of making a written declaration or agreement as to the value of its freight. Obviously, if they could do so legally, carriers would like to "release" all shippers' freight to a nominal value for loss and damage recovery. The interpretation adopted in the Commission's decision means that the carrier itself can release the value of the shipper's freight on all traffic moving under a bill of lading (which is to say all traffic moving in common carriage), merely by stating in its tariff that if the shipper does not release the shipment, the carrier will deem it released to the value chosen by the carrier.

The implications of the statutory misinterpretation are enormous. Whereas the law has been that the carrier is held to full value, except in limited situations where the shipper releases the value, the Commission has now allowed carriers to reverse the operation of the statute, without actual shipper knowledge or agreement.

II. THE COMMISSION RELIED ON A MISREADING OF JUDICIAL STATUTORY INTERPRETATION AS SETTLED, INSTEAD OF MAKING ITS OWN INTERPRETATION.

The government's brief repeatedly mischaracterizes the carriers' tariff release as an "inadvertence clause" rather than as what it is, an automatic release.[1] The term "automatic release"

[1]Though not involved in this case, an inadvertence clause is a tariff note stating that, if the shipper does not enter a written release of value on the bill of lading, the shipment will be accepted at full value and initially be charged at the higher rate. Afterward, the tariff gives the right to the shipper who inadvertently failed to declare the actual value of the shipment to

(continued)

is an opprobrious one. It is understood to describe the instant situation, where the shipper does not declare a limited value on the bill of lading and the carrier purports to release the value for the shipper to less than the shipment's actual value by a notice in its tariffs. In effect, the carrier would hold the shipper to a release of the value of its freight below its actual value, even though the shipper made no writing or declaration other than the normal one of affixing its signature to a bill of lading which stated no released value. Shippers consider such automatic tarriff releases reprehensible as well as illegal, because they purport to affix limited liability by the shipper's mere signature to a bill of lading on which it has elected not to declare a released value.

The government's brief relies primarily upon the same argument it advanced to the court of appeals, *viz.*, that "petitioners' reading is certainly a possible construction of the [statutory] language"; but that the statute is framed in "inherently ambiguous language", so that the court was bound under these circumstances to "give deference to the ICC", citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (Govt. brf. at 4-6.)

This is not an appropriate case for deference. In the first place, it is hard to imagine how Congress could have addressed the matter more clearly. It is inconceivable that Congress, which so clearly sought to prohibit loopholes in the Carmack Amendment (49 U.S.C. §20(11): "no contract, receipt, rule, regulation, or other limitations of any character whatsoever shall exempt such common carrier . . . from the liability imposed . . . and any such limitation, without respect to the manner or

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submit proof of the lower value and be accorded the lower rate applicable at that value. Thus, an inadvertence clause is entirely legal because it contemplates that the shipment is handled at full value, as required by the statute.

form in which it is sought to be made is declared to be unlawful and void'') would, *sub silentio,* leave open the biggest loophole of all: that carriers may turn bills of lading into releases of liability simply by so providing in their tariffs.[2]

Not only does the statute clearly proscribe tariff releases, but the ICC did not undertake to make its own construction of the statute. There is absent from the ICC's decision the required analysis of the statutory purpose, of its history, of contrary precedent and of competing policy considerations prerequisite to making a reasoned interpretation of what is now argued to be an ''ambiguous'' statute.

In contrast to the government's brief, which argues that the statute is ambiguous and required construction by the ICC, the Commission's decision turned on the conclusion that agency construction was not necessary because the courts had already reached a settled construction:

> Their position has been examined on numerous occasions by the courts and found wanting. Stated simply, it is beyond question that inadvertence clauses are lawful under sections 11707 and 11730. (Pet. App. B-6).

After citing a selection of court cases which it read as supporting automatic releases, the Commission reached this dispositive conclusion:

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[2]Similarly, the contention that the ICC has left open the door to shippers to challenge the operation of automatic releases in particular cases must be rejected. (See, e.g., govt. brf. at 4 n.2.) The Commission has sanctioned carrier limitations of liability which are inherently unlawful because they are neither disclosed nor agreed to by shippers. These are precisely the characteristics of limitations of liability Congress sought to prohibit. In any event, when Petitioners filed their complaint case to challenge individual automatic releases, the Commission summarily dismissed it, taking no evidence and receiving no briefs.

> In view of this virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs, we must dismiss complainant's facial attack on their use in defendants' tariffs. (Pet. App. B-8).

Thus, a fair reading of the decision warrants the conclusion that the Commission felt constrained to follow what it viewed as settled judicial construction and did not make an independent analysis of the statute. Accordingly, *Chevron* is not in point.

The contention is made repeatedly in the government's brief, based upon an erroneous assertion in the Commission's decision, that automatic tariff releases are necessary to preclude shippers from obtaining the benefit of lower released rates while shipping at full value. This is a basic misunderstanding of the current statute and directly contrary to Congressional intent. Under the statute, the carrier has three choices: (1) it can publish only full value rates; (2) it can publish full value rates and lower released value rates, leaving the shipper the option whether or not to declare a released value for rate purposes; or (3) it can publish only rates which contemplate a declaration of released value by the shipper.

A carrier which chooses the first option and, therefore, has no released rates, does not face any problem as to released rates. In the second option (which is the one followed by most carriers to date), the carrier faces none of the problems described by the government, *i.e.*, the shipper does not get the lower rate unless it declares the value on the bill of lading. It is only if it elects the third option that the carrier creates possible difficulties, *i.e.*, if it accepts the shipment and the shipper did not make a written declaration of value. But even in that situation the carrier is in complete control of whether there is a "problem". The statute gives the carrier the right to require the ship-

per to declare the limited value on the bill of lading. If the shipper does not want to release the value, the carrier can simply not accept the shipment. Moreover, even if a shipment was accepted without a declaration, the shipper would not be getting a "lower" rate, because this carrier has only one set of rates. Finally, of course, the carrier need compensate the shipper only where it has lost or damaged the shipper's freight.

With all of the above options available to the carriers and with the carrier in control of which set of rates it chooses to publish, the Commission has summarily sanctioned a fourth option which is contrary to statute. The fourth "option" is the same as (2), *supra,* but takes away the shipper's choice. If the shipper declares a value, the shipment is released. If it does not declare a value, the shipment is deemed released anyway. And what is left of the statutorily-conferred right of the shipper to elect whether or not to release the value of the shipment? Nothing. Yet the Commission has adopted a reading of the statute which nullifies its intent to guarantee the shipper's right to make a choice in writing.

III. THERE IS A CONFLICT AMONG THE CIRCUITS.

While the first section of the government's brief downgrades the Commission's reliance on the "settled" judicial construction of the statute (in order to support the argument that the ICC made its own analysis of the statute which deserved *Chevron* deference), the second section of its brief finds it expedient to argue that the construction has indeed been settled by the courts (in order to support the government's position that there is no conflict among the courts of appeals). As will be shown, the second prop of the brief is also misconceived.

Petitioners' brief cited decisions by courts of appeals in four circuits in conflict with the decision of the Third Circuit below.

Rather than acknowledging the obvious conflict and conceding these Petitioners their opportunity for a review by this Court, the government's brief chooses to undertake to distinguish all those cases as somehow not reaching a contrary conclusion. Before responding to the distinctions raised, it is worth noting that, in the argument before the Third Circuit, that court acknowledged that there is a split among the courts on the issue in question:

> Mr. Sweeney: I don't understand why counsel keeps disagreeing that there is a split — there is a split.
>
> The Court: I'll concede to you that there is a split.[3]

In *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978), the shipper left blank the standard clause on the bill of lading which provides for the insertion of a released value amount. The applicable tariff provided that shipments will be deemed released to a valuation of $.60 per pound unless specifically annotated on the bill of lading at a higher amount. The court noted the general proposition that the shipper is charged with notice of the terms of a carrier's tariff but held that the shipper did not "declare in writing the released value of the goods as plainly required by the terms of the Carmack Amendment." 591 F.2d at 108. This decision is in direct conflict with the decision below construing the same statute. The government's brief seeks to dismiss this decision by suggesting, *inter alia*, that there was also a second reason given for the result reached. Regardless of that suggestion, *Anton* does stand for a statutory interpretation in direct conflict with that in the instant case.

In the Second Circuit , in both *Gordon H. Mooney, Ltd. v. Farrell Lines, Inc.*, 616 F.2d 617 (2d Cir.), *cert. denied*, 449

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[3]Transcript of Oral Argument at 48. A copy of that page is attached hereto as an Appendix.

U.S. 875 (1980) and *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945), it was held that where the shipper did not write a value on the bill of lading, a tariff-stated limitation of liability was not binding in the face of the statutory requirement that the valuation must be declared in writing or agreed to by the shipper. 616 F.2d at 626; 149 F.2d at 430-32. Both are directly in point; but the government's brief refers to them as "older" cases and cites *Mechanical Technology Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087 (2d Cir. 1985) for an opposite view.[4]

In an opinion which only served to muddy the already murky waters in the area of the status of tariff limitations of liability, the court in that case held that (1) "The existence of a tariff is not in itself sufficient to limit liability" (*id.* at 1088); (2) that there must be a "fair opportunity to choose a lower level of liability" (*id.* at 1089 n.5); but (3) that "a sophisticated shipper using its own bill of lading form can be presumed to do so deliberately with full knowledge of the consequences under the applicable tariff". The court took pains not to overrule *Mooney* and *Caten*, and limited its opinion to "the specific facts of this case", 887 F.2d 1088-89.

In *Chandler & Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967), the court quoted at length from *Caten, supra*, to the effect that a valid release requires "a certain specified agreement . . . made as the result of an equally certain specified action by the shipper in respect to a *voluntary valuation of his goods.*" (374 F.2d at 135 n.10, emphasis added by the Fourth Circuit.) There is simply no way to reconcile this standard with automatic releases. The court went on to note that arrangements

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[4]*Fine Foliage of Florida, Inc. v. Bowman Transportation Inc.*, 698 F.Supp. 1566, 1575 (M.D. Fla. 1988) also demonstrates that the "older" (and correct) interpretation of the statute remains current. Most states also subscribe to this view as to intrastate commerce.

limiting liability "contravene a strong public policy expressed in the common law, come within a carefully defined exception to the general thrust of Section 20(11) of the Interstate Commerce Act placing on the carrier absolute liability for damage, and are in operation attended by characteristics of an adhesion contract." (374 F.2d at 135, footnotes omitted.) *Accord, Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978).

It is argued by the government (brief at 10) that the *Chandler* and *Mass* decisions by the Fourth and Ninth Circuits are irrelevant because they did not involve automatic releases in the carriers' tariffs. The distinction the government attempts to draw is unavailing. These decisions strongly support the traditional and natural interpretation of the statute that only shippers may execute valid releases, and that such releases require actual shipper knowledge of the limitation of liability, and affirmative shipper agreement to it, manifested in some way other than mere execution of a bill of lading. Having interpreted the statute in such a way as to preclude automatic releases, these decisions (like Congress itself) did not need to go on and state that carriers cannot do in secret and on their own that which shippers must agree to in writing.

The tortuous efforts by the government and amici to dispose of precedents that conflict with the decision below, and indeed the conflicts themselves, illustrate the futility of relying on individual cases involving a lost or broken article to clarify this contentious area of the law. Shippers and carriers need the clear guidance that can only come from a comprehensive examination of the issues raised in this case.

IV. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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April 13, 1990

APPENDIX A

COPY

IN THE THIRD CIRCUIT COURT OF APPEALS

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., Petitioners	:	
vs.	:	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents	:	NO. 89-3163
ROADWAY EXPRESS, INC.; NATIONAL FREIGHT CLAIMS & SECURITY COUNCIL OF AMERICAN TRUCKING ASSOCIATIONS; NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., Intervenors	:	

Philadelphia, PA, September 7, 1989

TAPE TRANSCRIPTION OF

HEARING IN THE ABOVE-CAPTIONED MATTER

BEFORE: THE HONORABLE CAROL LOS MANSMANN
THE HONORABLE RICHARD L. NYGAARD
THE HONORABLE RUGGERO J. ALDISERT

FOSTER COURT REPORTING SERVICE, INC.
1800 Architects Building - 117 S. 17th St.
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MR. SWEENEY: And let me help you on that one: If all these cases cited on both sides -- and there is a split and I don't understand why counsel keeps disagreeing that there is a split, there is a split.

THE COURT: I'll concede to you that there is a split.

MR. SWEENEY: Thank you, Your Honor.

These cases, as someone pointed out before, sure, you can go out on a case-by-case basis, thousands of these loss and damage cases coming through the court every year. Here is the most important issue on the entire landscape of loss and damage law today, it's going out to the courts on a case by case with private litigants on a one-shot deal, each litigant taking their best shot and the court doing the best it can.

Most of the cases that have been cited in the briefs that say that the courts have ruled against us on this issue, if you read those cases, including the ones